No. 15074

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

R. W. AGNEW,

Appellant,

vs.

CITY OF COMPTON, *et al.,*

Appellees.

Appeal From the United States District Court for the Southern District of California, Central Division.

REPLY BRIEF OF APPELLEE H. R. LINDEMULDER.

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Statement of the Case.

Appellant takes this appeal from a judgment in favor of the appellee granting a motion to dismiss the appellant's complaint.

The complaint is extremely verbose and prolix. Stipped of its utterly immaterial allegations, the complaint in so far as it relates to appellee Lindemulder, alleges that the appellant was a citizen of the United States and was a licensed electrical general contractor [Tr. p. 7]; that the City of Compton was a municipal corporation and the appellee H. R. Lindemulder was a police officer of the City of Compton.

Appellant then alleges a conspiracy on the part of the various defendants to deprive him of various Federal rights. The factual material forming the predicate for this alleged violation of the appellant's Federal rights is to be found in paragraphs XI, XII and XIII of the com-

plaint [Tr. pp. 12, 13, 14]. From these allegations it clearly appears that plaintiff was apparently the owner of certain personal property worth in the neighborhood of $12,000.00; that he desired to advertise and sell this property at public auction; that the appellee Lindemulder came upon the premises of the appellant during the course of the auction conducted by the appellant and arrested him for a violation of Section 6100.7 of the Compton Municipal Code, which section of the code, according to the complaint, prohibits the engagement in the business of auctioneering without a Compton business license. Appellant was also charged with a violation of Section 6200.24 of the Compton Municipal Code, to wit, the engaging in electrical contracting business without a Compton business license.

Thereafter apparently the criminal charges against the appellant were dismissed in the Municipal Court. The basis for the dismissal is not set forth [Tr. p. 15].

It is interesting to note that the appellant does not set forth the ordinance relating to the violation of law allegedly arising out of the carrying on of the auction, although the ordinance with respect of the electrical contracting business is set forth in great detail [Tr. pp. 17, 18].

No contention is made by the appellant that he was not in fact engaged in conducting an auction. No contention is made by the appellant that he had obtained a license to engage in the business of electrical contracting as is required by Ordinance 941, as set forth in the transcript [pp. 17, 18]. No claim is asserted by appellant that he possessed a license or permit to conduct an auction as required by the ordinance. No claim of diversity of citizenship is made.

ARGUMENT.

POINT ONE.

Ordinance No. 6100.7 of the Compton Municipal Code Must in the Absence of Further Allegations, Be Presumed to Be a Valid Exercise of the Police Power of the Municipality.

It is conceded by appellant that at the time of his arrest he was engaged in the auctioning off of some $12,000.00 worth of personal property. It is submitted that the right to sell property at public auction is not one which is guaranteed by the Federal Constitution. An auction is peculiarly susceptible to police regulation. The validity of ordinances and statutes regulating auctions has been uniformly sustained throughout the country. Thus the California Court in the case of *In re Bruce,* 54 Cal. App. 280, sustained the validity of an ordinance regulating the selling of the goods at public auction. The court, after pointing out that the ordinance was obviously partly regulatory and partly for the purpose of revenue (p. 281):

> "The police power, the power to make laws to secure the comfort, convenience, peace and health of the community, is an extensive one and in its exercise a very wide discretion as to what is needful or proper for the purpose is necessarily committed to the legislative body in which the power to make such laws is vested. * * * And the purposes of a taxing ordinance may be of a mixed nature and include both regulatory provisions and those designed to produce a revenue. * * * Conceding that an ordinance of the kind here presented, of mixed purpose and intent, is to be measured according to constitutional limitations affecting revenue measures, nevertheless every reasonable presumption will be

> indulged in as to its regularity, and if its terms, in any condition of the subject dealt with, appear valid, it will be sustained."

The validity of a Beverly Hills ordinance relating to auction sales, was sustained by the Supreme Court of the State of California in *Hart v. City of Beverly Hills,* 11 Cal. 2d 343, where the court thoroughly reviewed the contention that the ordinance was unconstitutional in that it violated various provisions of the State and Federal Constitutions and deprived the appellants of their property without due process of law. The court points out that auctions in their very nature are unusual in character and peculiarly call for the application of the police power to prevent disorder, breaches of the peace and fraud and otherwise preserve order and public health and safety. As the court states at page 349:

> "The police power of the state is not limited to the regulations necessary for the preservation of good order or the public health or safety. The prevention of fraud and deceit cheating and imposition is equally within the power, and a state may prescribe all such regulations as in its judgment will secure, or tend to secure the people against the consequences of fraud."

See also:

In re West, 75 Cal. App. 599.

Appellant, although not setting forth the full ordinance relating to the matter of auctioneering, is content with merely claiming that the ordinance purported to regulate those engaged in the business of auctioneering. He does not deny that he was conducting an auction of $12,000.00 worth of personal property, but claims that since the property belonged to him, that he was not engaged in

the *business* of auctioneering and therefore fell outside of the pale of this particular ordinance. Obviously such a claim is without merit. Any person could merely conduct an auction by the simple subterfuge of purchasing such property as he desired, acquiring title to it and then auctioning the same off as though it were his own.

It has been held that the right to regulate sales of this character includes a person selling his own goods, as well as those of others. Thus in *City of Chicago v. Ornstein,* 154 N. E. 100 (Ill.) the court states:

> "The right to regulate auctioneers has been exercised by the people through their legislators from colonial times to the present and as far as we are aware, has never been questioned. An auctioneer is one who conducts a public sale or auction (Bouvier's Law Dicts.) * * * one who conducts a sale by auction (Standard Dict.) * * * one who invites bids at public auction (Worcesters Dict.). It will be seen that it is immaterial whether the goods sold are those of the auctioneer or of another person who employs the auctioneer. *Goshen v. Kern,* 63 Ind. 468. The object of the regulation is to promote the general welfare by protecting the people from fraudulent sales and this protection is needed as much, if not more, where the auctioneer is selling his own goods as where he is selling the goods of another."

It has been well recognized that auction sales are attended with a greater risk of fraud and possible loss to the public than sales conducted in the ordinary or usual manner.

Saigh v. Common Council (Mich.), 231 N. W. 107;

Robinson v. Wood, 196 N. Y. Supp. 209.

It has been stated by the author of Corpus Juris Secundum, 53 C. J. S. p. 556:

> "* * * Where a statute so intends a single transaction may constitute the carrying on of the business or occupation licensed or taxes."

See:

State v. Mason, 78 P. 2d 920 (Utah).

The same proposition was urged in the case of *Mueller v. Birchfield,* 218 S. W. 2d 180 (Mo.), where the court stated:

> "The question might be raised whether or not the plaintiffs in this transaction were engaged 'in the business of buying, selling, dealing and trading in eggs,' within the meaning of our statute above quoted. We must hold that plaintiffs were 'engaged' in such business under the circumstances in this case, whether the transaction was for the sale of *one* truck load of eggs or for a hundred truck loads of eggs * * *.
>
> "Our statute was plainly for the protection of the people. It was not merely a revenue measure. In the later cases some of the authorities and cases hold that an isolated transaction does not amount to an engagement in the particular business."

It is submitted that in view of the fact that the appellant has failed to set forth the entire ordinance relating to auctioneering, this court must presume that the ordinance in question was both for the purpose of raising revenue and for the protection of the people in the exercise of the legitimate police power and that it was broad enough in its term to include and embrace an operation of the type and character which the appellant attempted

to engage in. It is apparent that Police Officer Lindemulder, the appellee herein, was merely attempting to enforce a valid ordinance of the City of Compton.

POINT TWO.

The Ordinance of the City of Compton Relating to the Requirement of a Business License as an Electrical Contractor, Was Clearly Valid.

Appellant does not claim that he was not in violation of the Compton City Ordinance. His contention apparently is that the Compton ordinance requiring such a license, was and is unconstitutional. Appellant's contention in this regard is utterly without merit. It is asserted that since the appellant was licensed as an electrical contractor by the State of California, that the City of Compton would not have the power or right to require the payment of a business license. This precise contention was laid to rest in the case of *Franklin v. Peterson,* 87 Cal. App. 2d 727. In this case a city license tax had been imposed upon a lawyer authorized to practice by the State Bar of California and who was required to pay an annual fee to the State Bar for his right to practice. It was held that the lawyer was nevertheless subject to the provisions of a local business licensing ordinance.

See also:

City of Corona v. Corona Daily Independent, 115 Cal. App. 2d 382;

Silversten v. City of Menlo Park, 17 Cal. 2d 197;

Ex parte Haskell, 112 Cal. 412;

American Locker Co. v. City of Long Beach, 72 Cal. App. 2d 280.

POINT THREE.

No Cause of Action Has Been Set Forth Under the Civil Rights Acts Of the United States and the District Court Had No Alternative But to Grant the Motion to Dismiss Appellant's Complaint.

The complaint is replete with allegations of bare generalities, and conclusions of law, without supporting factual allegations. Basically in so far as appellee Lindenmulder is concerned, the complaint, stripped of all its excess verbiage reveals no more than that a police officer arrested appellant while the latter was in the process of conducting, contrary to a municipal ordinance, a public auction. Clearly this arrest was made by appellee as a part of his duties as a policeman. He was not responsible for the passage of the ordinance nor could appellee be charged with the duty of passing upon the constitutionality of the ordinance.

The subsequent events following the arrest are those which normally follow any arrest such as finger printing, the taking of pictures and other legitimate police activities. The arrest of appellant on the second charge of failing to have a Compton business license is likewise in the same category. Appellant concedes he had no such license but bravely asserts that the ordinance is unconstitutional. Here again the police officer is in no position to pass on the validity of the ordinance. No system has yet been devised for determining *in advance* the constitutionality of the countless ordinances adopted by municipalities throughout the nation. Obviously some of the ordinances enacted may be declared unconstitutional by the courts. This is the function and the duty of the courts, not of police officers, sworn to enforce the laws.

Directly in point is the case of *Yglesias v. Gulfstream Park Racing Ass'n,* 201 F. 2d 817 (cert. den. in Sup. Ct., 345 U. S. 993; 73 S. Ct. Rep. 1132). In that case the complaint alleged that the various defendants "acting under the color" of the laws of Florida did subject the plaintiff to a deprivation of her rights secured by the constitution and did cause her to be falsely imprisoned without opportunity to confer with counsel and did cause her to be tried before a criminal court without opportunity to prepare for trial. The defendant police officers were alleged to have been a part of a conspiracy to arrest and imprison plaintiff and to deprive her of her civil rights. The District Court dismissed the complaint upon the ground that it failed to state a cause of action. The Circuit Court affirmed this ruling, saying in part, at page 818:

> "What we have in the substantive counts now before us is essentially a charge of false imprisonment, and perhaps malicious prosecution, to which has been added the factually unsupported allegation that plaintiff was thereby deprived of the right to due process, and other rights secured by the Fourteenth Amendment. It may be that the complaint alleges facts sufficient to support an action for false arrest or malicious prosecution. But to show that defendant deprived plaintiff of rights and immunities secured by the Fourteenth Amendment, or caused it to be done, or conspired to that end, plaintiff relies upon bare generalities and conclusions, unsupported by factual allegations. If this is sufficient, then every state court case of false imprisonment may be brought within federal jurisdiction by the mere unsupported assertion that as a consequence of such false imprisonment the plaintiff was deprived of due process, or of other rights secured by the Fourteenth Amendment. The decisions

are to the contrary. It has frequently been held and the rule is recognized in *Bell v. Hood,* 327 U. S. 678, 66 S. Ct. 773, 90 L. Ed. 939, 13 A. L. R. 2d 383, That where the alleged claim under the constitution or federal statutes clearly appears to be colorable, or made solely for the purpose of creating federal jurisdiction over what would otherwise be an action to vindicate a right arising only under state law, and no substantial facts establishing federal jurisdiction are alleged mere conclusions asserting the violation of a constitutional right are insufficient. Lyons v. Weltmer, 4 Cir., 174 F. 2d 473; Taylor v. Smith, 7 Cir., 167 F. 2d 797, 12 A. L. R. 2d 1; note 14 A. L. R. 2d Text page 1100, *et seq.,* McGuire v. Todd, 5 Cir., 198 F. 2d 60, and the many cases cited in Note 5 to that opinion, particularly Givens v. Moll, 5 Cir., 177 F. 2d 765; Bottone v. Lindsley, 10 Cir., 170 F. 2d 705; Moffett v. Commerce Trust Co., 8 State of West Virginia, 4 Cir., 156 F. 2d 739, and the note to Bell v. Hood, 327 U. S. 678, 66 S. Ct. 773, 90 L. Ed. 939, 13 A. L. R. 2d text at page 485. Cf. Adams v. Terry, 5 Cir., 193 F. 2d 600, 605, second column."

With reference to the bulk of the general factually unsupported allegations of appellant's complaint the court stated in McGuire v. Hood, 198 F. 2d 60, at page 63, as follows:

"It is sufficient for us in this case to say: that, as other courts have done, we disregard, as mere conclusions, the loose and general, the factually unsupported, characterizations of the complained of acts of the defendants, as malicious, conspiratorial, and done for the purpose of depriving plaintiffs of their constitutional rights; that the things defendants are alleged to have done, as distinguished from the conclusions of the pleaders with respect to them, do not

> constitute a deprivation of the civil rights of plaintiffs, do not give rise to the cause of action claimed; * * * ."

The same situation clearly appears in the case at bar. It is well settled that "a mere assertion by a plaintiff of entitlement to a Federal remedy does not satisfy Federal jurisdictional requirements, when the facts alleged do not support the assertion."[1] It is also clear that the Fourteenth and Fifteenth Amendments apply only to *state* action, as such, and not to wrongs perpetrated by one individual upon another.[2]

An important case decided by the Circuit Court of Appeals, Ninth Circuit, affirmed a ruling of the Honorable Harry C. Westover, dismissing the plaintiff's complaint because it stated no cause of action under the Civil Rights Acts. In *Dineen v. Williams,* 219 F. 2d 428 (1955) the plaintiff alleged that he had been arrested wrongfully and without probable cause in violation of the Civil Rights Acts. There was no diversity of citizenship involved. The Circuit Court upheld the action of the District Court and stated in part as follows:

> "The complaint stated a claim of false imprisonment cognizable only by state law, * * * But upon its fact the second amended complaint shows that the suggestion of federal jurisdiction was merely colorable and for the purpose of obtaining another forum. It is clear enough from the consideration above that this court finds no claim upon which relief could be granted in a federal court was stated.

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[1]*Brown v. City of Wisner,* La. 122 Fed. Supp. 736, at p. 738. See also *Kilgore v. McKethan,* 205 F. 2d 425.

[2]*Shelley v. Kraemer,* 334 U. S. 1, 3 A. L. R. 2d 441; *Brown v. City of Wisner* (*supra*).

> Since the trial judge obeyed the injunction that such a court should make positive of its power to act at the threshold, on that basis the dismissal is sustained."

It has been stated that "* * * the federal question must be real and substantial not colorable or frivolous. * * * Mere references to the Federal Constitution, laws or treaties and mere assertions that a federal question is involved are not sufficient to confer jurisdiction." *McCartney v. State of West Virginia,* 156 F. 2d 739 at 741.

See generally:

Moffett v. Commerce Trust Co., 187 F. 2d 242;
Gregoire v. Biddle, 177 F. 2d 579;
Campo v. Niemeyer, 182 F. 2d 115;
Bottone v. Lindsley, 170 F. 2d 705;
Love v. Chandler, 124 F. 2d 785.

It is obvious that the acts of the appellee Lindemulder did not deprive the appellant of any rights secured by the Constitution or the laws of the United States. Appellant had no right guaranteed by the Constitution to conduct a public auction, nor did he have any constitutional right to engage in the business of electrical contracting, without first procuring a valid license. It is quite obvious from the long history of litigation that precedes this case, that appellant is thoroughly familiar with the law in its various ramifications and is quite capable of defending himself before any court. He is obviously litigious (see *Agnew v. City of Los Angeles,* 110 Cal. App. 2d 612) and undoubtedly has considerably more experience in the field of constitutional law than appellee, police officer Lindemulder.

To attempt to fasten a civil liability on a police officer under these circumstances, is contrary to basic principles. It is the duty of every police officer to investigate crime and to institute criminal proceedings and in that connection it is settled that it is for the best interests of the community as a whole that he be protected from harassment in the performance of that duty, and public policy requires that he be shielded by the cloak of immunity from civil liability, unless it clearly appears that his conduct has been wilfully violative of some basic right possessed by the appellant.

See:

White v. Towers, 37 Cal. 2d 727;

Coverstone v. Davies, 38 Cal. 2d 315.

Recently a civil rights case was dismissed against a constable for performing his duty in serving a writ upon the plaintiff, the court holding that where the writ appeared valid on its fact, the constable was immune from civil liability.[3] The same principle must be applied to appellee Lindemulder, who was performing his official duty as a police officer.

Conclusion.

It is respectfully submitted that the judgment and order of the trial court was correct and should be affirmed. Appellant has shown no basis for any suit under the Federal Civil Rights Acts. The complaint fails to demonstrate the invalidity of any ordinance or ordinances under which the appellee Lindemulder, as a police officer, re-

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[3]*Thompson v. Baker,* 133 Fed. Supp. 247 (1955).

quired to uphold the laws of the City of Compton, attempted to act. In the absence of a showing of unconstitutionality, every intendment must be in favor of the Compton Municipal Ordinances and the action of the appellee Lindemulder was clearly within his authority as a police officer.

It is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

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